AGENDA ITEM

703 NOVEMBER 2017

DATE: **October 27, 2017**

TO: **Members, Board of Trustees**

FROM: **Justice Lee Edmon, Chair, Commission for the Revision of the Rules of Professional Conduct**
Randall Difuntorum, Office of Professional Competence

SUBJECT: **Consideration of Proposed Rule 5-110(E) of the Rules of Professional Conduct Following Public Comment – Request for No Rule to be Adopted**

EXECUTIVE SUMMARY

On May 1, 2017, the Supreme Court of California ("Court") issued an order on the State Bar's request to approve proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California. These proposals address the special responsibilities of a prosecutor in a criminal matter. The State Bar's request was granted in part and denied in part. Proposed rule 5-110(E) states the conditions that must be present before a prosecutor may issue a subpoena to a lawyer to present evidence about a current or former client. Rule 5-110(E) was denied but the Court's order directed the State Bar to reconsider whether this ethical obligation should apply to all lawyers, not only prosecutors.[1] The Board of Trustees ("Board") referred this matter to the Commission for the Revision of the Rules of Professional Conduct ("Commission") for further study. On July 15, 2017, the Commission circulated for a 45-day public comment period three alternative rule proposals concerning the ethical obligations applicable when a subpoena is issued to a lawyer to present evidence about a former or current client. Five public comments were received, including a comment from the Office of Chief Trial Counsel ("OCTC"). Following consideration of the public comments at the Commission's meeting on October 24, 2017, this agenda item presents the Commission's recommendation that the Board cease consideration of a rule concerning issuing a subpoena to an attorney. This agenda item also requests the Board to direct staff to submit a supplemental memorandum to the Court in order to report on the changes to proposed rule 3.8, the counterpart to current rule 5-110, which was submitted on March 30, 2017.

Members with questions about this agenda item may contact Randall Difuntorum at: (415) 538-2161.

BACKGROUND

The Commission met on July 5, 2017 to study the Supreme Court's May 1, 2017 order directing the State Bar reconsider whether the rule concerning the conditions that must be present before

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[1] The full text of the Supreme Court's May 1, 2017 order is included as Attachment A.

a prosecutor may issue a subpoena to a lawyer to present evidence about a former or current client is an ethical obligation that should be imposed on all attorneys, as opposed to only prosecutors. In addition, the Commission considered the Supreme Court's direction to consider whether the substitution of the terms "reasonably necessary" for "essential" under paragraph (E)(2), and "reasonable" for "feasible" under paragraph (E)(3) would be appropriate, should the Board choose to recommend a rule applicable to all attorneys.

Following study, the Commission developed three alternative rule proposals:

- Alternative 1 – a revision to proposed rule 3.4 stating a subpoena restriction imposed on all lawyers;
- Alternative 2 – a revision to proposed rule 3.8 that would apply only to prosecutors; and
- Alternative 3 – a revision to proposed rule 3.8 that would also apply only to prosecutors but narrowed in scope to apply only to subpoenas of current or former counsel in a criminal matter.

In addition, the public comment posting sought input on the foundational question of whether there should be any rule at all on the subject of subpoenas of other lawyers.[2] These three rule proposals were circulated for a 45-day public comment period on July 14, 2017, with a public comment deadline of August 28, 2017. Five public comments were received. (A public comment synopsis table that includes Commission responses is provided as Attachment C. The full text of the comments is provided as Attachment D.)

DISCUSSION

The Commission met on October 24, 2017. Following consideration of the public comments received and discussion of the three rule alternatives, the Commission determined that no rule governing the issuance of subpoenas to attorneys should be adopted.[3] Some of the reasons for the Commission's recommendation include:

- None of the public comments received demonstrated a need for such a rule. No empirical evidence was submitted to suggest the need for a rule in either the civil or criminal context.

- In the civil context, several public comments noted that this concern is adequately regulated by existing rules, statutes, and case law. Some of these authorities include Evidence Code § 955, which requires an attorney to assert the attorney-client privilege whenever he or she is present when the communication is sought to be disclosed; and, the Civil Discovery Act which contains procedures for parties in a civil action to meet and confer regarding discovery requests, including discovery demanded by subpoena. Parties may also seek a protective order against subpoenas that improperly seek privileged attorney-client communications.

[2] Board agenda item 702 JULY 2017 is included as Attachment B. This agenda item provides relevant background for this matter including the proposed language for each alternative rule.

[3] A compilation of the Commission Member's emails sent to staff prior to the Oct. 24th meeting articulating their position on a proposed rule following consideration of the public comments received is included as Attachment E.

- Also in the civil context, case law has been developed to limit the practice of deposing opposing counsel. See, *Carehouse Convalescent Hospital v. Superior Court* (2006) 143 Cal.App.4th 1558, 1562 (stating depositions of opposing counsel "are presumptively improper, severely restricted, and require 'extremely' good cause—a high standard"); *Spectra-Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487. The case law and the other existing law demonstrate adequate regulation in the civil context.

- In the criminal context, the Commission found it significant that no public comments were received from the defense bar in support of a subpoena rule. Given the extensive amount of defense bar comments received on the separate matter of the duty to disclose exculpatory evidence (rule 5-110(D)), if attorney subpoenas issued by prosecutors in California presented a serious concern, the Commission expected to receive a similar level of defense bar comment.

- Also in the criminal context, the Commission believes that abusive prosecutorial misconduct would likely be proscribed by rule 3.8(b) (prosecutor must give defendants reasonable access to counsel) and rule 8.4(d) (conduct prejudicial to the administration of justice).

- The Commission believes there are compelling reasons for issuing subpoenas for non-privileged evidence from lawyers in criminal investigations and cases. Supreme Court case law appears to support this view as well. For example, in fee forfeiture cases, the United States Supreme Court has generally disposed of constitutional challenges to even "retroactive" forfeiture of fees that are proceeds of a crime. The United States Supreme Court has stated in that narrow circumstance that the Sixth Amendment does not provide an absolute right to counsel of choice. See, *United States v. Monsanto* (1989) 491 U.S. 600, *Caplin & Drysdale v. United States* (1989) 491 U.S. 617, and *Luis v. United States* (2016) 136 S. Ct. 1083. However, the Court in *Monsanto* intimated that abusive attempts designed to oust counsel would violate the Sixth Amendment and the Fifth and Fourteenth Amendments.

- The Commission considered their original charter which stated the Commission should begin with the current California rules and focus on changes to the rules that are necessary to address changes in the law and, where necessary, to eliminate differences between the California rules and the rules adopted by a preponderance of states in order to promote a national standard. The Commission noted this rule would not advance either principle. First, California does not currently have a rule governing the issuance of a subpoena to attorneys in the criminal context, and no jurisdiction has a rule in the civil context. Second, the goal of national uniformity would not meaningfully be furthered by adoption of such a rule because many of the largest jurisdictions have not adopted a rule governing prosecutor subpoenas to attorneys. These jurisdictions include New York, the District of Columbia, Florida, and Texas—each jurisdiction has federal prosecution offices similar in size and caseload to that of California.

- Lastly, the Commission found OCTC's following comment to be persuasive:

  "OCTC is not aware of a great need for a rule of professional conduct addressing when an attorney can or cannot subpoena a lawyer in a civil or criminal proceeding to present evidence about a current or former client. The superior courts and

administrative courts appear to be able to control any abuses through their current authority and the current rules, without a new rule of professional conduct."

For the foregoing reasons, the Commission took a vote to not adopt any of the three proposed rule alternatives and to recommend that no rule governing the issuance of subpoenas to attorneys in either a criminal or civil context be adopted. The vote tally was unanimous: 6 yes, 0 no, and 0 abstentions.

Supplemental Supreme Court Filing

If the Board agrees with the Commission's recommendation to cease consideration of paragraph (e) or any similar proposal to regulate subpoenas of lawyers, then the question arises as to how this Board decision should be reported to the Court. In consultation with the Commission's Court liaison, it has been determined that the Board's decision on paragraph (e) can be included in the State Bar's supplemental rule filing on proposed rule 3.8.

Proposed rule 3.8 is the counterpart to current rule 5-110 in the Board's comprehensive rule revisions. Proposed rule 3.8 remains pending with the other 67 proposed new and amended rules sent to the Court on March 30, 2017 that included a complete renumbering of all of the rules, including renumbering rule 5-110 as rule 3.8. Given the recent actions taken on rule 5-110, proposed rule 3.8 needs to be conformed and replaced with a new version. The version filed on March 30, 2017 includes an outdated version of paragraph (d) and paragraph (e) language that was rejected by the Court in its May 1, 2017 order. If the Board agrees with the Commission's recommendation to cease consideration of paragraph (e), then the State Bar's further consideration of the entirety of rule 5-110 in response to the May 1, 2017 order will be complete.

To be prepared for the anticipated Court action on rule 5-110 that is presently pending review on an expedited basis, it would be appropriate to authorize staff to prepare and submit a supplemental memorandum to the Court conforming the rule 3.8 proposal to the version of rule 5-110 approved by the Court. In addition, this supplemental memorandum would report on the Board's reconsideration of paragraph (e), including the Commission's development of three alternative rule proposals, the public comments received on the proposals, and the Board's action on the Commission's recommendation to abandon further consideration of such a rule. An amended rule 3.8 is provided as Attachment F for the Board's adoption on a contingent basis subject to the Court taking final action on rule 5-110. The language in this draft of the rule assumes that the Court will approve proposed rule 5-110 as submitted. Staff will only submit the rule in Attachment F to the Court if that is the case. If the Court alters or denies the proposal, then staff will not submit anything to the Court until the Board has had an opportunity to consider a version of proposed rule 3.8 that is conformed to whatever new version of rule 5-110 might be approved by the Court.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

This agenda item requests that the Board resolve to not adopt a rule of professional conduct concerning the ethical obligations applicable when a subpoena is issued to a lawyer to present evidence about a former or current client in either a criminal or civil context.

This agenda item also requests Board adoption of amended proposed rule 3.8 (Special Responsibilities of a Prosecutor) which reflects changes to the proposed rule following the Supreme Court's May 1, 2017 order instructing further consideration. Business and Professions Code section 6077, in part, provides: "The rules of professional conduct adopted by the Board, when approved by the Supreme Court, are binding upon all members of the State Bar." Accordingly, Board action alone does not effectuate an amendment to the rules.

BOARD BOOK IMPACT

None.

STRATEGIC PLAN GOALS & OBJECTIVES 2017-2022

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Objective: None.

RECOMMENDATION

Should the Board of Trustees agree with the above recommendation, the following resolution would be appropriate:

> **RESOLVED**, following notice and publication for comment and upon the recommendation of the Commission for the Revision of the Rules of Professional Conduct, that the Board of Trustees recommends that no rule of professional conduct addressing the ethical obligations applicable when a subpoena is issued to a lawyer to present evidence about a former or current client be adopted; and it is
>
> **FURTHER RESOLVED**, that upon the recommendation of the Commission for the Revision of the Rules of Professional Conduct, that the Board of Trustees adopt proposed amended rule 3.8 of the Rules of Professional Conduct, as set forth in Attachment F.
>
> **FURTHER RESOLVED**, that staff is directed to submit a supplemental memorandum to the Supreme Court of California, after the Court takes action on proposed amended rule 5-110 that was adopted by the Board on July 13, 2017, informing the Court of the necessary conforming changes to proposed rule 3.8, as set forth in Attachment F, but subject to the condition that the Court's action approves proposed amended rule 5-110 as adopted by the Board on July 13, 2017, without any changes.

ATTACHMENT(S) LIST

- **A.** Supreme Court order filed on May 1, 2017 (case no. S239387)
- **B.** Board Agenda Item 702 JULY 2017
- **C.** Summary of Public Comments with Commission Responses

D. Full Text of Public Comments

E. Compilation of Commission Member Emails

F. Amended Proposed Rule 3.8

S239387

ADMINISTRATIVE ORDER 2017-04-26

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

ORDER RE REQUEST FOR APPROVAL OF AMENDMENTS TO RULE 5-110 AND RULE 5-220 OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA.

On January 9, 2017, the Board of Trustees of the State Bar of California filed a request for approval of recommended amendments to rule 5-110 and rule 5-220 of the California Rules of Professional Conduct. (Bus. & Prof. Code, § 6076.) The request is granted in part and denied in part.

The request to add paragraphs (A), (B), (C), (F), (G), and (H), and Discussion paragraphs [1], [2], and [5] through [9] to rule 5-110, and to add a discussion paragraph to rule 5-220, is granted. These amendments are set forth in the approved versions of rule 5-110 and rule 5-220 appended as Attachment 1 to this order, and are effective May 1, 2017.

The request to add paragraph (D) to rule 5-110 and its related Discussion paragraphs [3] and [4], concerning prosecutors' ethical pretrial disclosure obligations, is denied. The court directs the Board to consider the alternative revisions set forth in Attachment 2 to this order, and to assess whether any such revisions may warrant further public comment. Additionally, the court requests that the Board explain the meaning of the terms "cumulative disclosures of information" as used in the second sentence of Discussion paragraph [3], or alternatively, consider removing this portion of the sentence from the Discussion paragraph. To the extent the Board chooses to recommend any revisions to rule 5-110(D) and Discussion paragraphs [3] and [4], the Board may submit such revisions for court approval immediately following its consideration of such revisions. For the present time, paragraph (D) and Discussion paragraphs [3] and [4] shall be designated as "reserved," as set forth in the approved version of rule 5-110 appended as Attachment 1 to this order.

The request to add paragraph (E) to rule 5-110, regarding the conditions that must be present before a prosecutor may issue a subpoena to a lawyer to present evidence about a former or current client, is denied. The court directs the Board to reconsider whether this is an ethical obligation that should be imposed on all attorneys, not only prosecutors. To the extent the Board chooses to recommend a more broadly applicable rule patterned on

the language in proposed rule 5-110(E), the court directs the Board to reconsider whether substitution of the terms "reasonably necessary" for "essential" under proposed paragraph (E)(2), and "reasonable" for "feasible" under proposed paragraph (E)(3), would be appropriate. The Board may submit a recommendation for a new or revised rule on this subject matter at any time it deems appropriate.

In light of the court's decision to not approve proposed rule 5-110(E), paragraphs (F), (G), and (H), and references thereto, shall be relabeled as paragraphs (E), (F), and (G), respectively, as set forth in the approved version of rule 5-110 appended as Attachment 1 to this order.

It is so ordered.

CANTIL-SAKAUYE

Chief Justice

WERDEGAR, J.

Associate Justice

CHIN, J.

Associate Justice

CORRIGAN, J.

Associate Justice

LIU, J.

Associate Justice

CUÉLLAR, J.

Associate Justice

KRUGER, J.

Associate Justice

ATTACHMENT 1

Rule 5-110 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(A) Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;

(B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;

(D) *Reserved.*

(E) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.

(F) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) Promptly disclose that evidence to an appropriate court or authority, and

(2) If the conviction was obtained in the prosecutor's jurisdiction,

(a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and

(b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(G) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient

evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Rule 5-110 is intended to achieve those results. All lawyers in government service remain bound by rules 3-200 and 5-220.

[2] Paragraph (C) does not forbid the lawful questioning of an uncharged suspect who has knowingly waived the right to counsel and the right to remain silent. Paragraph (C) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] *Reserved.*

[4] *Reserved.*

[5] Paragraph (E) supplements rule 5-120, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. Paragraph (E) is not intended to restrict the statements which a prosecutor may make which comply with rule 5-120(B) or 5-120(C).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rule 3-110, Discussion.) Ordinarily, the reasonable care standard of paragraph (E) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (F) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (F) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 2-100.)

[8] Under paragraph (G), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (F) and (G), though subsequently determined to have been erroneous, does not constitute a violation of rule 5-110.

(Adopted, eff. May 1, 2017.)

Rule 5-220 Suppression of Evidence

A member shall not suppress evidence that the member or the member's client has a legal obligation to reveal or produce.

Discussion

See rule 5-110 for special responsibilities of a prosecutor.

(Adopted, eff. May 1, 2017.)

ATTACHMENT 2

Proposed alternative revisions to Rule 5-110(D) and Discussion paragraphs [3] and [4] for consideration by the State Bar's Board of Trustees

The prosecutor in a criminal case shall:

. . .

(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, ~~or~~ mitigates the offense, ~~and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor that the prosecutor knows or reasonably should know~~ or mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal~~;~~. This obligation includes the duty to disclose information that casts significant doubt on the accuracy or admissibility of witness testimony or other evidence on which the prosecution intends to rely;

. . .

[3] The disclosure obligations in paragraph (D) ~~include exculpatory and impeachment material relevant to guilt or punishment and~~ are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. Nevertheless, ~~Although~~ rule 5-110 ~~does not incorporate the *Brady* standard of materiality, it~~ is not intended to require disclosure of cumulative ~~disclosures of~~ information or ~~the disclosure of~~ information that is protected from disclosure by federal or California laws and rules, as interpreted by cases law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and rule 5-110 is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[4] The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

AGENDA ITEM

702 JULY 2017

DATE: **July 7, 2017**

TO: **Members, Board of Trustees**

FROM: **Justice Lee Edmon, Chair, Commission for the Revision of the Rules of Professional Conduct**
Randall Difuntorum, Director, Professional Competence

SUBJECT: **Reconsideration of Proposed Rule 5-110(E) of the Rules of Professional Conduct – Request for Release for Public Comment**

EXECUTIVE SUMMARY

On May 1, 2017, the Supreme Court of California ("Supreme Court") issued an order on the State Bar's request to approve proposed amendments to rules 5-110 and 5-220 of the Rules of Professional Conduct of the State Bar of California. These proposals address the special responsibilities of a prosecutor in a criminal matter. The State Bar's request was granted in part and denied in part. Proposed rule 5-110(E) states the conditions that must be present before a prosecutor may issue a subpoena to a lawyer to present evidence about a current or former client. Rule 5-110(E) was not approved but the Supreme Court's order provides instructions for the State Bar's further consideration. The Board of Trustees ("Board") referred this matter to the Commission for the Revision of the Rules of Professional Conduct ("Commission") for study and development of revised rule proposals. This item requests that the Board circulate, for a 45-day public comment period, proposed rule amendments developed by the Commission following a study of the Supreme Court's order.[1]

Members with questions about this agenda item may contact Randall Difuntorum at (415) 538-2161.

BACKGROUND

Attachment 2 is Board agenda item 703 MAY 2017. This agenda item provides the relevant background for this matter including the full text of the Supreme Court's May 1, 2017 order.

[1] Attachment 1 provides the clean text of alternative drafts that are recommended for public comment circulation.

DISCUSSION

As submitted to the Supreme Court, the Board's amendments to Rule 5-110 included proposed paragraph (E) which provides that a prosecutor must not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege or work product protection; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information. The proposed rule provision tracked the language of ABA Model Rule 3.8(e), which is applicable only to prosecutors. In its May 1, 2017 order, the Supreme Court directed the State Bar to reconsider whether "this is an ethical obligation that should be imposed on all attorneys, not only prosecutors." The Supreme Court also directed the State Bar to consider whether the substitution of the terms "reasonably necessary" for "essential" under paragraph (E)(2), and "reasonable" for "feasible" under paragraph (E)(3) would be appropriate.

At its meeting on July 5, 2017, the Commission studied the instructions provided by the Supreme Court on proposed Rule 5-110(E). The Commission also considered input from the Office of the Chief Trial Counsel ("OCTC") in a June 29, 2017 letter addressing both paragraph (D) and paragraph (E) of proposed Rule 5-110. Regarding paragraph (E), OCTC's letter states:

> Also, if there is going to be a proposed rule addressing the conditions required for a criminal prosecutor to issue a subpoena to present evidence about an attorney's former or current client, the rule should apply to all attorneys, not just criminal prosecutors. OCTC agrees with the Supreme Court's suggestion that such a rule substitute the term "reasonably necessary" for the term "essential" in what was subsection (E)(2) of the former proposal. The term "reasonably necessary" is a fairer, more definite and understandable, and more appropriate term. California should not discipline attorneys who honestly and reasonably believed the proposed witness was reasonably necessary. Likewise, OCTC also agrees with the Supreme Court's suggestion that such a rule substitute the term "reasonable" for the term "feasible" in what previously was subsection (E)(3). Again, the term "reasonable" is fairer, more definite, clearer, and more appropriate than "feasible."

The Commission was provided with an excerpt from the United States Attorneys Manual setting forth "Guidelines for Issuing Subpoenas to Attorneys for Information Relating to the Representation of Clients." This was provided as an example of a policy that provides conditions for issuing subpoenas that extends to both criminal and civil matters. Similarly, the Commission was provided with an excerpt from Wisconsin's version of Model Rule 3.8(e) that deletes the word "criminal" and extends the rule to subpoenas by a prosecutor in "a grand jury proceeding or other proceeding."

The Commission also was provided with an amicus brief filed by the American Bar Association ("ABA") in the United States Supreme Court. The ABA's brief supports a petition for writ of certiorari filed by the Supreme Court of New Mexico, the Disciplinary Board of New Mexico, and the Office of the Disciplinary Counsel of New Mexico.[2] Among the issues in this case is the

[2] The United States Supreme Court case is *United States, Petitioner v. Supreme Court of New Mexico, et al.*, Case No. 16-1450. The lower court case is *United States v. Supreme Court of*

question whether New Mexico Rule of Professional Conduct 16-308(E), which is identical to ABA Model Rule 3.8(e), applies to federal prosecutors bringing a matter before a grand jury. In part, the ABA amicus brief provides valuable background on the ABA's adoption of Model Rule 3.8(e). The brief explains that Model Rule 3.8 was adopted following consideration of a 1986 report of the ABA Criminal Justice Section that included observations on increasing frequency of federal grand jury subpoenas issued to opposing counsel in criminal matters.

Following study, the Commission has drafted three alternative proposed rule amendments for which a 45-day public comment period is requested. At its July 5th meeting, the Commission reserved its deliberations on the policy question of whether this ethical obligation to refrain from subpoenas of other lawyers except under certain conditions should be contained in a rule applicable to all lawyers as opposed to prosecutors only. In the 2016 public comment circulation of the initial proposed rule 5-110, only three comments that addressed paragraph (E) were received.[3] It is possible that the *Brady* disclosure aspect of proposed rule 5-110 resulted in less attention being paid to paragraph (E). It is anticipated that the present public comment that focuses on proposed paragraph (E) will garner a more robust response that will better inform the Commission's consideration of this major question and facilitate the Commission's preparation of a well-developed recommendation to the Board.

Alternative 1 – Proposed New Paragraph (f) to Proposed Rule 3.4: This alternative proposal allows the State Bar to obtain public comment on a rule that would apply to all lawyers and would include as options the language substitutions in the Supreme Court's order. This proposal would modify proposed Rule 3.4 (entitled "Fairness to Opposing Party and Counsel"). Rule 3.4 was adopted by the Board and submitted to the Supreme Court on March 30, 2017 as part of the State Bar's proposed comprehensive revisions to the rules. As Alternative 1 is intended to be a rule generally applicable to all lawyers, it would not be appropriate to place this ethical obligation in proposed Rule 3.8 (the counterpart to current Rule 5-110 in the Bar's comprehensive revisions) because Rule 3.8 addresses only the special responsibilities of a prosecutor in a criminal matter. If Alternative 1 were ultimately adopted by the Board, then staff would prepare and submit to the Supreme Court a supplemental rule filing that modifies the version of Rule 3.4 previously submitted to the Supreme Court as a part of the State Bar's comprehensive revisions.

As drafted by the Commission, Alternative 1's new paragraph (f) of Rule 3.4 provides that:

> A lawyer shall not:
>
> * * * * *
>
> (f) subpoena a lawyer in any civil or criminal proceeding, including grand jury proceedings, to present evidence about a current or former client unless the lawyer seeking the subpoena reasonably believes:

New Mexico, United States Court of Appeals for the Tenth Circuit Case Nos. 14-2037 and 14-2049.

[3] Of the three comments received, one raised an issue that the provision might conflict with California law (2016-67, David Boyd), one favored a rule provision with a less stringent standard as suggested by the Court (2016-85, U.S. Department of Justice), and one approved the rule as proposed and eventually submitted to the Court (2016-322, COPRAC).

> (1) the information sought is not protected from disclosure by any applicable privilege or work product protection;
>
> (2) the evidence sought is [essential/reasonably necessary] to the successful completion of an ongoing criminal investigation or prosecution, or is [essential/reasonably necessary] to support the claim or defense asserted in an ongoing civil investigation or proceeding; and
>
> (3) there is no other [feasible/reasonable] alternative to obtain the information;

As indicated above, the Commission has placed in brackets optional language for public commenters to consider in paragraphs (f)(2) and (f)(3). These options should allow commenters to consider the original language adopted by the Board as well as the substitute language in the Supreme Court's order. The public comment solicitation will specifically identify this issue as one on which comment is sought. By issuing optional language for public comment, the Board preserves flexibility in adopting a final rule after consideration of the comments received.

Alternative 1 also includes a proposed new Comment [2] to clarify paragraph (f) as follows:

> [2] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in criminal or other proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship. (See generally, *Carehouse Convalescent Hosp. v. Superior Court* (2006) 143 Cal.App.4th 1558 [50 Cal.Rptr.3d 129]; *Spectra Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487 [244 Cal.Rptr. 258].)

Alternative 2 – Proposed Revised Paragraph (e) of Proposed Rule 3.8 Governing Subpoenas of Any Lawyer of an Accused, Including Lawyers in Civil Matters: This alternative proposal would retain the limited scope of the Board's original proposed rule as an ethical obligation imposed only on a prosecutor in a criminal matter and would include as options the language substitutions in the Supreme Court's order. Because this rule would not apply to all lawyers, it is appropriate to place this duty in the rule governing the special responsibilities of a prosecutor in a criminal matter. However, the Commission is not recommending expedited action by the Board or the Court to implement this change in current Rule 5-110. If this Alternative 2 ultimately is adopted by the Board and approved by the Supreme Court, then this change would modify proposed Rule 3.8 that was adopted by the Board and submitted to the Supreme Court on March 30, 2017 as part of the State Bar's proposed comprehensive revisions to the rules. Unlike the Supreme Court's instructions for the State Bar's reconsideration of Rule 5-110(D) (re *Brady* disclosures), the Court did not "reserve" a place for a subpoena obligations provision in the approved amended version of Rule 5-110 that became operative on May 1, 2017. Instead, the Supreme Court's order expressly stated that the Bar may submit a recommendation for a new or revised rule on the subject of subpoena obligations at any time that the Board deems appropriate. Accordingly, if Alternative 2 is finally adopted by the Board, staff would prepare and submit a supplemental filing to the Supreme Court that modifies the version of Rule 3.8 submitted on March 30, 2017 with State Bar's comprehensive revisions. In fact, a State Bar supplemental filing on proposed Rule 3.8 is necessary regardless of whether this alternative is adopted because the Supreme Court's changes to Rule 5-110 operative on May 1, 2017 call for conforming changes to the version of proposed Rule 3.8 presently on file and pending action by the Supreme Court.

As drafted by the Commission, Alternative 2's proposed revised paragraph (e) of proposed Rule 3.8 provides that:

> The prosecutor in a criminal case shall:
>
> * * * * *
>
> (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a current or former client unless the prosecutor reasonably believes:
>
> (1) the information sought is not protected from disclosure by any applicable privilege or work product protection;
>
> (2) the evidence sought is [essential/reasonably necessary] to the successful completion of an ongoing investigation or prosecution; and
>
> (3) there is no other [feasible/reasonable] alternative to obtain the information; and

The Commission has developed this alternative draft to obtain public comment on the language substitutions presented in the Supreme Court's order in the context of a proposed rule that otherwise is substantially identical to the rule originally adopted by the Board. Alternative 2 is limited to a prosecutor in a criminal matter, including a grand jury proceeding. Unlike Alternative 1, Alternative 2 does not extend to a lawyer in a civil proceeding. Although substantially identical to the rule originally adopted by the Board, the Commission has implemented one stylistic revision to the language originally adopted by the Board. The Commission has replaced the reference to a "past or present client" with "current or former client." The latter phrase is the usual language used throughout the rules. Neither the current rules nor the Board adopted proposed rules use the phrase "past or present client" and including it here could lead to ambiguity in construing the language.

Alternative 3 – Proposed Revised Paragraph (e) of Proposed Rule 3.8 Narrowed to Apply Only to Subpoenas of Current or Former Counsel in a Criminal Matter: Like Alternative 2, this alternative proposal would retain the limited scope of the Board's original proposed rule as an ethical obligation imposed only on a prosecutor in a criminal matter, including a grand jury proceeding, and would include as options the language substitutions in the Supreme Court's order. Also like Alternative 2, this change would modify proposed Rule 3.8 that was adopted by the Board and submitted to the Supreme Court on March 30, 2017 as part of the State Bar's proposed comprehensive revisions to the rules. The difference with Alternative 2 is that Alternative 3 narrows the scope of regulated subpoenas to only those subpoenas that are issued to a criminal defense counsel. In Alternative 2, the scope is significantly broader because it does not matter whether the subpoena is issued to an attorney who is representing or previously represented a client in a criminal *or civil* matter. In both instances, a prosecutor's compliance with the rule is required. In contrast, under Alternative 3 the rule does not apply in situations where the subpoena is issued to a lawyer who previously represented the accused in a civil representation.

As drafted by the Commission, Alternative 3's proposed revised paragraph (e) of proposed Rule 3.8 provides that:

The prosecutor in a criminal case shall:

* * * * *

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a current or former client represented by the lawyer in a criminal matter unless the prosecutor reasonably believes:*

(1) the information sought is not protected from disclosure by any applicable privilege or work product protection;

(2) the evidence sought is [essential/reasonably necessary] to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other [feasible/reasonable] alternative to obtain the information; and

The Commission has developed this alternative draft to obtain public comment on the language substitutions presented in the Supreme Court's order in the context of a proposed rule that is narrowed to address only those situations that implicate an accused's Sixth Amendment right to counsel. The Commission acknowledges that these circumstances will always implicate the underlying public protection concern that the rule is intended to address. Other situations may involve abusive subpoenas that intrude on the attorney-client relationship but the Commission believes that the greatest threat of harm is to attorney-client relationships that impair an accused's Sixth Amendment right to counsel. In addition, the Commission observes that there are other existing professional conduct standards that generally apply to abusive subpoenas. (See, e.g., Business and Professions Code section 6068, subdivisions (c) and (g), that impose a duty to maintain only actions or proceedings that are just and that prohibit the commencement or continuance of an action or proceeding from any corrupt motive of passion or interest.)

The Commission requests authorization for a 45-day public comment period on the three above alternative rule amendment proposals. Aside from the three alternative drafts, the Commission also requests that the public comment posting indicate that the Board is interested receiving public comments on the foundational question of whether there should be any rule at all on the subject of subpoenas of other lawyers.[4] The Commission believes that this approach preserves the greatest flexibility for the Board to adopt a rule after consideration of the public comments received. Representatives of the Commission will attend the Board's July 13, 2017 meeting to present each alternative draft.

FISCAL/PERSONNEL IMPACT

None.

[4] At the Commission's July 5, 2017 meeting one Commission member observed that while many jurisdictions have adopted a version of ABA Model Rule 3.8(e), some of the jurisdictions that have rejected the rule include: District of Columbia; Florida; Maryland; Massachusetts; New York; Texas; and Virginia. (See ABA table posted at: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_e.authcheckdam.pdf .)

RULE AMENDMENTS

This agenda item requests authorization for a 45-day public comment period on proposed amendments to the Rules of Professional Conduct. Board action to adopt the amendments would occur only after the public comment process. Rule of Professional Conduct amendments adopted by the Board do not become binding and operative unless and until they are approved by the Supreme Court of California.

BOARD BOOK IMPACT

None.

PROPOSED BOARD COMMITTEE RESOLUTION

Should the Board of Trustees agree with the above recommendation, the following resolution would be appropriate:

> **RESOLVED**, that the Board of Trustees authorizes staff to make available, for public comment for a period of 45-days, alternative proposals to amend the Rules of Professional Conduct concerning the ethical obligations applicable when a subpoena is issued to a lawyer to present evidence about a former or current client, as set forth in Attachment 1; and it is
>
> **FURTHER RESOLVED**, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

ATTACHMENT(S) LIST

1. Clean text of alternative drafts of proposed rules: Alternative 1 – Rule 3.4; Alternative 2 – Rule 3.8, which broadly governs subpoenas of lawyers; and Alternative 3 – Rule 3.8, which is narrowed to apply only to subpoenas of lawyers in criminal matters, all of which are recommended for public comment circulation

2. Board Agenda Item 703 MAY 2017 (including the Supreme Court's May 1, 2017 order)

Rule 3.4 Fairness to Opposing Party and Counsel
(Proposed Rule as Adopted by the Commission on July 5, 2017 – Alternative 1)

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person* to do any such act;

(b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;

(c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably* incurred by a witness in attending or testifying;

(2) reasonable* compensation to a witness for loss of time in attending or testifying; or

(3) a reasonable* fee for the professional services of an expert witness;

(e) advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein;

(f) subpoena a lawyer in any civil or criminal proceeding, including grand jury proceedings, to present evidence about a current or former client unless the lawyer seeking the subpoena reasonably believes:*

(1) the information sought is not protected from disclosure by any applicable privilege or work product protection;

(2) the evidence sought is [essential / reasonably necessary]⊕ to the successful completion of an ongoing criminal investigation or prosecution, or is [essential/reasonably necessary]⊕ to support the claim or defense asserted in an ongoing civil investigation or proceeding; and

⊕ This language is bracketed to indicate that comment is sought on which term ("essential" or "reasonably necessary") the public believes is appropriate for this rule.

(3) there is no other [feasible / reasonable][∅] alternative to obtain the information;

(g) knowingly* disobey an obligation under the rules of a tribunal* except for an open refusal based on an assertion that no valid obligation exists; or

(h) in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

Comment

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See, e.g., Penal Code § 135; 18 United States Code §§ 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code § 132; 18 United States Code § 1519. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

[2] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in criminal or other proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship. (See generally, *Carehouse Convalescent Hosp. v. Superior Court* (2006) 143 Cal.App.4th 1558 [50 Cal.Rptr.3d 129]; *Spectra Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487 [244 Cal.Rptr. 258].)

[3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this rule.

[∅] This language is bracketed to indicate that comment is sought on which term ("feasible" or "reasonable") the public believes is appropriate for this rule.

Rule 3.8 Special Responsibilities of a Prosecutor
(Proposed Rule as Adopted by the Commission on July 5, 2017 – Alternative 2)

The prosecutor in a criminal case shall:

(a) not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;

(b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;

(d) *Reserved.*[+]

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a current or former client unless the prosecutor reasonably believes:*

(1) the information sought is not protected from disclosure by any applicable privilege or work product protection;

(2) the evidence sought is [essential/reasonably necessary][⊕] to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other [feasible/reasonable][∅] alternative to obtain the information; and

(f) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.

(g) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

[+] The parts of this rule designated as "*Reserved*" (paragraph (D) and Comments [3] and [4]) are the subject of pending consideration by the State Bar and the Supreme Court of California.

[⊕] This language is bracketed to indicate that comment is sought on which term ("essential" or "reasonably necessary") the public believes is appropriate for this rule.

[∅] This language is bracketed to indicate that comment is sought on which term ("feasible" or "reasonable") the public believes is appropriate for this rule.

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.* Rule 3.8 is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4.

[2] Paragraph (c) does not forbid the lawful questioning of an uncharged suspect who has knowingly* waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable* waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] *Reserved.*[+]

[4] *Reserved.*[+]

[5] Paragraph (f) supplements rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (f) is not intended to restrict the statements which a prosecutor may make which comply with rule 3.6(b) or 3.6(c).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (g) requires prompt disclosure to

the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 4.2.)

[8] Under paragraph (h), once the prosecutor knows* of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

Rule 3.8 Special Responsibilities of a Prosecutor
(Proposed Rule as Adopted by the Commission on July 5, 2017 – Alternative 3)

The prosecutor in a criminal case shall:

(a) not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;

(b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;

(d) *Reserved.*[+]

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a current or former client represented by the lawyer in a criminal matter unless the prosecutor reasonably believes:*

(1) the information sought is not protected from disclosure by any applicable privilege or work product protection;

(2) the evidence sought is [essential/reasonably necessary][⊕] to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other [feasible/reasonable][∅] alternative to obtain the information; and

(f) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.

(g) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

[+] The parts of this rule designated as "*Reserved*" (paragraph (D) and Comments [3] and [4]) are the subject of pending consideration by the State Bar and the Supreme Court of California.

[⊕] This language is bracketed to indicate that comment is sought on which term ("essential" or "reasonably necessary") the public believes is appropriate for this rule.

[∅] This language is bracketed to indicate that comment is sought on which term ("feasible" or "reasonable") the public believes is appropriate for this rule.

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.* Rule 3.8 is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4.

[2] Paragraph (c) does not forbid the lawful questioning of an uncharged suspect who has knowingly* waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable* waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] *Reserved.*[+]

[4] *Reserved.*[+]

[5] Paragraph (f) supplements rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (f) is not intended to restrict the statements which a prosecutor may make which comply with rule 3.6(b) or 3.6(c).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (f) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (g) requires prompt disclosure to

the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 4.2.)

[8] Under paragraph (h), once the prosecutor knows* of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

Proposed Rule on Subpoenaing Attorneys
Synopsis of Public Comments

TOTAL = 5 ***A = 0*** ***D = 5*** ***M = 0*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A / D / M / NI[1]	Comment	RRC Response
A1-2017-1	Ham, James (07-28-17)	No	D	1. To my knowledge, there is no empirical or anecdotal evidence suggesting that civil attorneys are abusing the subpoena power by subpoenaing other attorneys to present evidence about a past or present client. 2. In the civil context, existing rules of civil procedure adequately regulate the issuance of subpoenas and offer protection against abuse. The Discovery Act contained in the Code of Civil Procedure contains procedures requiring parties in a civil action to meet and confer regarding discovery requests, including discovery demanded by subpoena. 3. It is not clear why this particular perceived abuse should be singled out in the civil arena for special disciplinary treatment. Attorneys who issue legal process of any kind without a reasonable belief that their actions are legally justified and appropriate are not acting professionally. But it is the responsibility of the courts, in the first instance, to referee the conduct of litigation which by its nature is adversarial.	After further consideration of proposed rule 3.4(f) [Alt. 1] and the public comments received, the Commission agrees with the Commenter that a disciplinary rule analogous to Model Rule 3.8(e) that applies to all lawyers, including those in civil practice is not warranted. Regulation of subpoenas served on lawyers in the civil context is adequately addressed by the Discovery Act in the Code of Civil Procedure and the exercise of a court's inherent authority to supervise and control the proceedings before it.

[1] A = AGREE with proposed Rule M = AGREE with proposed Rule ONLY IF MODIFIED

Proposed Rule on Subpoenaing Attorneys
Synopsis of Public Comments

TOTAL = 5 ***A = 0*** ***D = 5*** ***M = 0*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A / D / M / NI[1]	Comment	RRC Response
A1-2017-3	Los Angeles County Bar Association Professional Responsibility and Ethics Committee (Eskridge) (08-23-17)	Y	D	We are not commenting on Alt. 2 or Alt 3. We are opposed to Alt. 1 because existing rules of civil procedure adequately regulate the issuance of subpoenas and offer protection against abuse, and we are unaware of any empirical data or anecdotal evidence suggesting the existence of a problem involving the abuse of civil subpoenas directed against attorneys in the context of civil proceedings. To the extent that ABA Model Rule 3.8 was designed to deter federal prosecutors from interfering with the relationship between criminal defendants and their lawyers, the same concerns are not present in the civil context.	See Response to James Ham, A1-2017-1, above.
A1-2017-4	State Bar of California, Committee on Professional Responsibility and Conduct ("COPRAC") (Spencer) (08-25-17)	Y	D	1. COPRAC does not believe extension of the duties concerning subpoenaing lawyers to all attorneys and to civil matters is appropriate for a number of reasons: First, the Civil Discovery Act expressly permits subpoenaing lawyers and imposes a well-developed procedural mechanism for doing so. Second, a host of legitimate reasons may exist to subpoena lawyers in civil cases because evidence in the possession of an attorney is often relevant in civil litigation, particularly in	1. See Response to James Ham, A1-2017-1, above.

Proposed Rule on Subpoenaing Attorneys
Synopsis of Public Comments

TOTAL = 5 ***A = 0*** ***D = 5*** ***M = 0*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A / D / M / NI[1]	Comment	RRC Response
				cases involving attorney-client fee disputes, professional negligence, or advice of counsel defenses. Third, in addition to the prohibition on seeking privileged information, the proposed rule would impose ethical duties on lawyers seeking non-privileged information – which would otherwise be freely discoverable under existing civil discovery standards and case law. 2. In the context of criminal proceedings, where prosecutors wield the power of the state and a defendant's life and/or liberty is at stake, ethical limitation on subpoenaing lawyers – particularly defense counsel – seems justified. COPRAC therefore supports adoption of either Alt. 2 or Alt. 3, but as between the two, COPRAC has no opinion. COPRAC is concerned that the Supreme Court's suggestion that the words "essential" in proposed rule 3.8(e)(2) and "feasible" in 3.8(e)(3) might be replaced with "reasonably necessary" and "reasonable," respectively, would make the Rule so nebulous as to, in practical effect, render it of little use.	2. After further consideration of the alternative proposed provisions limited to prosecutors and the public comment received, the Commission has determined that a provision corresponding to Model Rule 3.8(e) is not warranted. The Commission believes that other law is sufficient to address the threat of prosecutorial intrusion into an accused's attorney-client relationship. Further, the Commission has determined there is insufficient empirical evidence to justify the need for such a disciplinary rule in California.
A1-2017-2	State Bar of California, Office of Chief Trial Counsel ("OCTC") (Moawad) (08-18-17)	Y	D	1. OCTC is not aware of a great need for a rule of professional conduct addressing when an attorney can or cannot subpoena a lawyer in a civil or criminal proceeding to present evidence	The Commission agrees that there is no need for a disciplinary rule governing the issuance for subpoenas to a lawyer in either the criminal or civil context.

Proposed Rule on Subpoenaing Attorneys
Synopsis of Public Comments

TOTAL = 5 ***A = 0*** ***D = 5*** ***M = 0*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A / D / M / NI[1]	Comment	RRC Response
				about a current or former client. The superior courts and administrative courts appear to be able to control any abuses through their current authority and the current rules, without a new rule of professional conduct. 2. But, if there is going to be a rule addressing the conditions required before a criminal prosecutor can issue a subpoena to present evidence about an attorney's former or current client, it should apply to all attorneys. 3. OCTC agrees with the Supreme Court suggestion to substitute the term "reasonably necessary" for the term "essential" and "reasonable" for the "feasible." 4. Of the three alternatives, OCTC prefers Alt. 1 as fairer and more appropriate. 5. As between Alt. 2 and Alt. 3, OCTC prefers Alt. 2 as fairer and more appropriate. Criminal defense attorneys should not be treated differently than other attorneys.	
A1-2017-5	United State Department of Justice (Goldsmith & Ludwig) (08-28-17)	Y	D	We respectfully submit that there is no empirical evidence of prosecutors, let alone federal prosecutors, in California using subpoenas to interfere with attorney-client relationships in a way that	See response to OCTC, A1-2017-2, above.

Proposed Rule on Subpoenaing Attorneys
Synopsis of Public Comments

TOTAL = 5 ***A = 0*** ***D = 5*** ***M = 0*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A / D / M / NI[1]	Comment	RRC Response
				would warrant creating an ethical rule to regulate their doing so. In addition, as the U.S. Court of Appeals for the Tenth Circuit recently recognized in *U.S. v. Sup. Ct. of N.M., et al.*, 839 F.3d 888 (10th Cir. 2017), applying such a rule to federal prosecutors, at least in the grand jury context, violates the Supremacy Clause. There are petitions for writs of certiorari pending before the Supreme Court. If the Commission nevertheless thinks that it is necessary and appropriate to limit the circumstances in which state and federal prosecutors ethically can compel an attorney to provide non-privileged evidence in criminal investigations and cases, we think that it would be prudent for the Commission to defer any action on the proposed rule until the Supreme Court has decided to review the Tenth Circuit's decision. If the Commission decides to adopt an attorney subpoena rule despite the Supremacy Clause problem identified by the Tenth Circuit, we agree with the Office of Chief Trial Counsel that the proposed rule should apply to all lawyers, because the attorney-client relationship also may be affected when an attorney is subpoenaed in a civil case.	

Proposed Rule on Subpoenaing Attorneys
Synopsis of Public Comments

TOTAL = 5 ***A = 0*** ***D = 5*** ***M = 0*** ***NI = 0***

No.	Commenter/Signatory	Comment on Behalf of Group?	A / D / M / NI[1]	Comment	RRC Response
				Although there is a strong public interest in giving prosecutors broad investigative authority in criminal investigations and cases that is at least equal to the interests of private litigants in civil cases, we thank that Alt. 2 is the better choice. Regardless of which alternative the Commission decides to adopt, however, we also strongly agree with the Office of Chief Trial Counsel that the proposed rule should permit a lawyer to subpoena another lawyer for non-privileged information relating to the representation of a current or former client where "the evidence sought is *reasonably necessary*" and "there is no other *reasonable* alternative to obtain the information."	

FULL TEXT OF PUBLIC COMMENT – TABLE OF CONTENTS

Attachment D - Full Text of Public Comments

PANSKY MARKLE HAM LLP

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July 27, 2017

Via E-Mail

Ms. Mimi Lee
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Public Comment on Proposed Rule 5-110(E) [Rule 3.8(e)]
Special Responsibilities of a Prosecutor

Dear Ms. Lee:

I am a former member of the second Commission for the Revision of the Rules of Professional Conduct and have been a practicing attorney for more than 35 years. I have been a 30-plus year member of the Los Angeles County Bar Association's Committee on Professional Responsibility and Conduct, chairing that committee twice, and also served a term on COPRAC many years ago. I am an active member of the Association of Professional Responsibility Lawyers, chairing its public statements committee, and acting as its liaison to the ABA's Committee on Professional Discipline. I have also taught legal ethics at the University of Southern California's Gould School of Law.

ABA Model Rule 3.8(e) includes a provision limiting the ability of a prosecutor to subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client. The Commission is considering an alternative – Alternative 1 – which would revise proposed Rule 3.4 to impose a similar restriction on all lawyers, not just prosecutors.

I oppose Alternative 1. First, to my knowledge, there is no empirical or anecdotal evidence suggesting that civil attorneys are abusing the subpoena power by subpoenaing other attorneys to present evidence about a past or present client. In the absence of such evidence, there does not appear to be any need or justification for the addition of a disciplinary rule of this sort. To my knowledge, no other state has adopted such a disciplinary rule.

Second, in the civil context, existing rules of civil procedure adequately regulate the issuance of subpoenas and offer protection against abuse. The Discovery Act contained in the Code of Civil Procedure contains procedures requiring parties in a civil action to meet and confer regarding discovery requests, including discovery demanded by subpoena. In addition, if necessary, parties may obtain a

protective order against subpoenas that improperly seek privileged attorney-client communications. Civil courts – both state and federal – have ample authority to regulate civil discovery through the issuance of protective orders and sanctions for abuse of the subpoena process.

There are many circumstances where issuance of a subpoena to a civil attorney concerning the attorney's involvement with a client or former client is appropriate because the attorney is in possession of unprivileged material relevant to a particular controversy. For example, transactional lawyers who were involved in business negotiations or transactions now in dispute may be subpoenaed to testify about unprivileged communications with third parties, and their files may contain numerous relevant and unprivileged documents, including unprivileged communications from the client. Attorneys may also be subpoenaed in connection with disputes over trust and estate matters, or in malpractice proceedings, or where the attorney has engaged in misconduct or otherwise abused the attorney-client privilege to further a client's fraud.

Third, it is not clear why this particular perceived abuse should be singled out in the civil arena for special disciplinary treatment. Attorneys who issue legal process of any kind without a reasonable belief that their actions are legally justified and appropriate are not acting professionally. But it is the responsibility of the courts, in the first instance, to referee the conduct of litigation which by its nature is adversarial. The courts already have the power to sanction attorneys for litigation abuse, and underlying conduct can already be reviewed by the Office of Chief Counsel under existing law. For example, Rule 3-200 [proposed Rule 3.1] prohibits an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person. Proposed California Rule 3.2 provides that a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

For the foregoing reasons, I cannot recommend Alternative 1 for adoption.

Sincerely yours,

James I. Ham

RRC3 Proposed Rules Public Comment Form 5-110(E)

Professional Affiliation	LACBA Professional Responsibility and Ethics Committee
Commenting on behalf of an organization	Yes
Name	Gayle Eskridge
City	Torrance
State	California
Email address	geskridge@eskridgelaw.net
If you have a preference (for either Alternative 1, 2, or 3), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	None of the Alternatives Above
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	
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Receive Mass Email?	To receive e-mail notifications regarding the rules revision project, check the box indicating that you would like to be added to the Commission's e-mail list and enter your email address below. Email addresses will be used only to deliver the requested information. We will not use it for any other purpose or share it with others.

LACBA
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August 23, 2017

Ms. Mimi Lee
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Rule of Professional Conduct 5-110(E)

Dear Ms. Lee:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association ("PREC") appreciates the opportunity to comment on the draft alternatives to Proposed Rule of Professional Conduct 5-110(E) prepared by the State Bar's Commission for the Revision of the Rules of Professional Conduct (the "Rules Revision Commission"). Under the new numbering system proposed by the Rules Revision Commission, current Rule 5-110 would be renumbered as Rule 3.8. For consistency, instead of referring to proposed Rule 5-110(E) in this letter, we refer to proposed Rule 3.8(e).

As submitted to the California Supreme Court, proposed Rule 3.8 included proposed paragraph (e) which limited the ability of a prosecutor to subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client. This proposal tracked the language of ABA Model Rule 3.8(e). In its May 1, 2017 order, the Supreme Court directed the State Bar to consider whether "this is an ethical obligation that should be imposed on all attorneys, not only prosecutors." In response, the Rules Revision Commission developed alternative revisions, which were approved by the State Bar's Board of Trustees on July 13, 2017 and released for a 45-public comment period ending on August 28, 2017.

Alternative 1 presents a revision to proposed Rule 3.4 (titled "Fairness to Opposing Party and Counsel"), proposing that the subpoena restriction be imposed on all lawyers, not just prosecutors. This would be accomplished by creating a new paragraph (f) to proposed Rule 3.4. PREC is not commenting on Alternatives 2 and 3 prepared by the Rules Revision Commission.

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[1] Please note that, as a matter of policy, the members of PREC who are current members of the Rules Revision Commission have abstained in their capacity as members of PREC from voting with respect to this comment letter.

PREC is opposed to Alternative 1 of proposed Rule 3.8 because existing rules of civil procedure adequately regulate the issuance of subpoenas and offer protection against abuse, and we are unaware of any empirical data or anecdotal evidence suggesting the existence of a problem involving the abuse of civil subpoenas directed against attorneys in the context of civil proceedings.

The Discovery Act contained in the Code of Civil Procedure contains procedures requiring parties in a civil action to meet and confer regarding discovery requests, including discovery demanded by subpoena. In addition, if necessary, parties may obtain a protective order against subpoenas that improperly seek privileged attorney-client communications. Civil courts have ample authority to regulate discovery through the issuance of protective orders and sanctions for abuse of the subpoena process.

In addition, there are many circumstances where issuance of a subpoena to a civil attorney is appropriate because the attorney is in possession of relevant, unprivileged material relevant to the controversy. For example, transactional lawyers who were involved in business transactions now in dispute may be subpoenaed to testify about unprivileged communications with third parties, and their files may contain numerous unprivileged documents. Attorneys may also be subpoenaed in connection with disputes over trust and estate matters, or in malpractice proceedings, or where the attorney has engaged in misconduct or otherwise abused the attorney-client privilege to further a client's fraud.

Against this backdrop, we are unaware of any studies, empirical data, or anecdotal evidence suggesting that a rule of attorney discipline is necessary to curb abuses of civil subpoenas directed against other attorneys. The absence of abuse in this area also suggests why other states have not extended the ABA Model Rule 3.8 provision to reach civil proceedings.

Given the existence of adequate procedural safeguards and the lack of evidence that a disciplinary rule is needed to protect the public, the courts, and the administration of justice in the context of civil proceedings, we do not believe that Alternative 1 should be adopted.

Finally, to the extent that ABA Model Rule 3.8 was designed to deter federal prosecutors from interfering with the relationship between criminal defendants and their lawyers, the same concerns are not present in the civil context.

Model Rule 3.8 was developed by the ABA due to concern over what was seen as attempts by Federal prosecutors to interfere with the relationships between criminal defendants and their lawyers, in derogation of their rights under the Sixth Amendment. This interference took the form of the subpoenaing of defense lawyers to appear before Federal grand juries. The mere fact of the subpoena created a risk to the lawyer-client relationship. Clients naturally would be concerned about whether their lawyers would look out for their own interests rather than their clients' interests. To take one of a number of possible examples, the client might be concerned that the lawyer would be tempted to sacrifice the client's interest because of an offer or threat by the Federal prosecutor.

The purpose of professional discipline is "… to protect the public, the courts and the legal profession." *In re Kreamer*, 14 Cal.3d 524, 532 (1975). A prosecutor's use of a subpoena to interfere with an accused's relationship with his or her lawyer is wrongful no matter what later transpires between the Federal prosecutor and the defense lawyer. Even if the subpoena were withdrawn quickly, the threat and fear would remain. The bell could not be unrung. This is intolerable in the Sixth Amendment context, and Model Rule 3.8(e) addresses the issue directly. A prosecutor's use of a subpoena in this manner is wrongful, and it should be the subject of discipline under the standard of *In re Kreamer*.

Because a subpoena on a criminal defense attorney may negatively impact the attorney-client relationship in a way which cannot be controlled by a court, regulating subpoenas in the criminal context may justify a disciplinary rule. The same is not true in the civil context. The issuance of a subpoena to an opposing counsel might cause some delay and additional expense, but it does not by itself interfere with the lawyer-client relationship. It therefore can be regulated through the civil discovery process and by the trial court. *See Carehouse Convalescent Hospital v. Superior Court*, 143 Cal.App.4th 1558 (2006).

Accordingly, we do not believe that Rule 3.8 should be expanded to include civil proceedings.

Thank you again for the opportunity to comment on Proposed Rule of Professional Conduct 3.8(e).

Very Truly Yours,

Gayle L. Eskridge
PREC Chair

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

August 25, 2017

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Reconsideration of Proposed Rule 5-110(E) of the Rules of Professional Conduct

Dear Justice Edmon:
The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the proposed alternatives for Rule 5-100(E) of the Rules of Professional Conduct concerning subpoenaing lawyers. COPRAC supports adoption of either Alternatives 2 or 3, imposing duties on prosecutors subpoenaing lawyers in grand jury or criminal proceedings. COPRAC does not support the adoption of Alternative 1, which would expand the duties imposed on prosecutors subpoenaing lawyers in grand jury or criminal proceedings to all attorneys, not only prosecutors.

COPRAC does not believe extension of the duties concerning subpoenaing lawyers to all attorneys and to civil matters is appropriate for a number of reasons. First, the Civil Discovery Act expressly permits subpoenaing lawyers and imposes a well-developed procedural mechanism for doing so. That mechanism provides notice and opportunity to object to a former or existing client whose records are sought from an attorney. *See* Cal. Civ. Code § 1985.3. Unless the client is also a party to the litigation, the assertion of the objection alone is sufficient to stop the production absent a court order. In terms of eliciting testimony from an opposing party's lawyer, case law in the civil arena has already been developed to curb that practice. *See, e.g., Spectra-Physics, Inc. v. Superior Court*, 198 Cal.App.3d 1487 (1988).

Second, a host of legitimate reasons may exist to subpoena lawyers in civil cases because evidence in the possession of an attorney is often relevant in civil litigation, particularly in cases involving attorney-client fee disputes, professional negligence, or advice of counsel defenses. An ethical limitation on seeking what would otherwise be clearly relevant and admissible evidence in civil litigation serves no useful purpose and may in fact chill an attorney's zealous representation of a client by seeking to obtain information from all available sources.

Third, in addition to the prohibition on seeking privileged information, the proposed rule would impose ethical duties on lawyers seeking non-privileged information – which would otherwise be freely discoverable under existing civil discovery standards and case law. COPRAC is not aware

of any justification for imposing limitations different from those articulated in the Civil Discovery Act and well-developed case law on a lawyer's ability to obtain relevant, non-privileged information simply because it is in the possession of another attorney.

On balance, the proposed Alternative 1 Rule 3.4 would create an ethical rule imposing duties and restrictions on seeking evidence in a civil case that appears inconsistent with existing case law and statutes. If grounds exist to further limit the right to subpoena lawyers in civil cases, those further limitations should come from the legislature or develop through case law, as has been the case to date. A new ethical rule imposing further limitations on lawyer subpoenas that are potentially contrary to existing law will not serve the profession well in the Committee's opinion.

In the context of criminal proceedings, where prosecutors wield the power of the state and a defendant's life and/or liberty is at stake, ethical limitations on subpoenaing lawyers – particularly defense counsel – seem justified. COPRAC therefore supports adoption of either Alterative 2 or 3, but as between the two, COPRAC has no opinion.

Finally, as to the Supreme Court's suggestion that the term "reasonably necessary" replace "essential" and the term "reasonable" replace "feasible," COPRAC is concerned that replacing the terms "essential" and "feasible" would make the Rule so nebulous as to, in practical effect, render it of little use. If the purpose of the Rule is, as it was at least historically, to address potential misuse of the power of the state when attempting to obtain information in the possession of a defendant's or other lawyer, the more narrow standard of "essential" and "feasible" seems more appropriate to actually limit the activity the Rule intends to curb. A standard based on what the prosecutor "reasonably believes" is "reasonably necessary" seems too low to have any impact.

Thank you for your consideration of our comments.

Very truly yours,

Suzanne Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

THE STATE BAR
OF CALIFORNIA

OFFICE OF CHIEF TRIAL COUNSEL

Steven J. Moawad, *Chief Trial Counsel*

845 SOUTH FIGUEROA STREET, LOS ANGELES, CALIFORNIA 90017-2515
180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1617

TELEPHONE: (213) 765-1468

August 18, 2017

Justice Lee Edmon
Randall Difuntorum
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comment on proposed revisions to Rules 3.4 and 3.8 of the Proposed Rules of Professional Conduct

Dear Justice Edmon and Mr. Difuntorum:

The Office of Chief Trial Counsel (OCTC) thanks the Commission for the opportunity to again express its comments on the issues the Supreme Court referred to the State Bar in its May 1, 2017 Order, regarding rules involving attorneys subpoenaing other attorneys to obtain information on clients or former clients. With any revision to any of the Rules of Professional Conduct, OCTC wants to assure that the rules (1) protect the public; (2) are not purely aspirational; and (3) can be understood by the membership and enforced by our office. Also, the Comments to the Rules should be used sparingly and only to elucidate, and not to expand upon, the rules themselves.

OCTC is not aware of a great need for a rule of professional conduct addressing when an attorney can or cannot subpoena a lawyer in a civil or criminal proceeding to present evidence about a current or former client. The superior courts and administrative courts appear to be able to control any abuses through their current authority and the current rules, without a new rule of professional conduct.

But, if there is going to be a rule addressing the conditions required before a criminal prosecutor can issue a subpoena to present evidence about an attorney's former or current client, it should apply to all attorneys. Civil attorneys can abuse the subpoena process as readily as criminal prosecutors. Further, if the rule is going to apply to civil proceedings, it should also apply to administrative proceedings. The State Bar Act and the Rules of Professional Conduct sets forth a comprehensive scheme for regulating the entire practice of law in California, including when attorneys appear before administrative agencies (see *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 67-69; *In the Matter of Moriarty* (Review Dept. 2017) 2017 WL 1424407) and "the standards governing an attorney's ethical duties do not vary according to the many areas of practice." (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 511.)

OCTC agrees with the Supreme Court's suggestion that the rule substitute the term "reasonably necessary" for the term "essential" in what was subsection Rule 5-110(E)(2) of the former proposal on this issue. The term "reasonably necessary" is a more definite, understandable, and appropriate term. California should not discipline attorneys who honestly and reasonably believed the proposed witness was reasonably necessary. Likewise, OCTC also agrees with the Supreme Court's suggestion that such a rule substitute the term "reasonable" for the term "feasible" in what previously was subsection (E)(3) of proposed Rule 5-110. Again, the term "reasonable" is more definite, clear, and appropriate than "feasible."

Of the three alternatives, OCTC prefers Alternative 1 [Proposed Rule 3.4(f) of the Rules of Professional Conduct] as fairer and more appropriate. It applies to both civil and criminal cases. OCTC also prefers using the term "reasonably necessary" and "reasonable" in the rule, as just discussed.

OCTC supports Comment 2 to Alternative 1 [Proposed Rule 3.4(f) of the Rules of Professional Conduct].

As between Alternative 2 and Alternative 3, OCTC prefers Alternative 2 as fairer and more appropriate. Criminal defense attorneys should not be treated differently than other attorneys.

Very truly yours,

Steven J. Moawad
Chief Trial Counsel

RRC3 Proposed Rules Public Comment Form 5-110(E)

Professional Affiliation	United States Department of Justice
Commenting on behalf of an organization	Yes
Name	Stacy M. Ludwig
City	Washington, DC
State	Washington DC
Email address	Stacy.Ludwig2@usdoj.gov
If you have a preference (for either Alternative 1, 2, or 3), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	No Rule is Necessary
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	
Attachment	Letter_to_the_California_Commission_for_the_Revision_of_the_California_R.._08_28_17.pdf (74k)
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U.S. Department of Justice

August 28, 2017

Commission for the Revision of the Rules of Professional Conduct
State Bar of California
c/o Mimi Lee
Office of Professional Competence, Planning, and Development
180 Howard Street
San Francisco, CA 94105

Re: Revisions to Proposed California Attorney Subpoena Rule

Dear Commission Members:

Introduction

On behalf of the U.S. Department of Justice ("the Department"), including the over 400 Department attorneys who practice in California, we respectfully submit that there is no empirical evidence of prosecutors, let alone federal prosecutors, in California using subpoenas to interfere with attorney-client relationships in a way that would warrant creating an ethical rule to regulate their doing so. In addition, as the U.S. Court of Appeals for the Tenth Circuit recently recognized in United States v. Sup. Ct. of N.M., et al., 839 F.3d 888 (10th Cir. 2017), applying such a rule to federal prosecutors, at least in the grand jury context, violates the Supremacy Clause. There are petitions for writs of certiorari pending before the Supreme Court. If the Commission nevertheless thinks that it is necessary and appropriate to limit the circumstances in which state and federal prosecutors ethically can compel an attorney to provide non-privileged evidence in criminal investigations and cases, we think that it would be prudent for the Commission to defer any action on the proposed rule until the Supreme Court has decided whether to review the Tenth Circuit's decision.

If the Commission decides to adopt an attorney subpoena rule despite the Supremacy Clause problem identified by the Tenth Circuit, we agree with the Chief Trial Counsel that the proposed rule should apply to all lawyers, because the attorney-client relationship also may be affected when an attorney is subpoenaed in a civil case.[1] Although there is a strong public interest in giving prosecutors broad investigative authority in criminal investigations and cases that is at least equal to the interests of private litigants in civil cases, if the Commission concludes that the proposed rule only should apply to prosecutors, we think that Alternative 2 is the better choice. Regardless of which alternative the Commission decides to adopt, however, we also strongly agree with the Chief Trial Counsel that the proposed rule should permit a

[1] Although we oppose application of such a rule to federal prosecutors practicing in federal court, we acknowledge that each federal district court in California has adopted the Rules of Professional Conduct of the State Bar of California through their local rules, see N.D. Cal. Civ. R. 11-4(a); S.D. Cal. Civ. R. 83.4(b); E.D. Cal. R. 180(e); C.D. Cal. Civ. R. 83-3.1.2.

lawyer to subpoena another lawyer for non-privileged information relating to the representation of a current or former client where "the evidence sought is *reasonably necessary*" and "there is no other *reasonable* alternative to obtain the information."

Discussion

Rule 3.8(e) of the American Bar Association's Model Rules of Professional Conduct, which forms the basis of the proposed California attorney subpoena rule and is substantially the same as Alternative 2, was adopted in 1990 and subsequently amended in 1995. It was adopted based on reports in the mid-1980's and 1990's finding that prosecutors, and federal prosecutors in particular, increasingly were subpoenaing attorneys to the grand jury to provide testimony related to their clients.[2] In the more than a quarter-century since its adoption, thirty-three jurisdictions have adopted a version of the Rule.[3] Eighteen jurisdictions, however—including six of the ten most populous jurisdictions—did not adopt the Rule.[4] When Commission Member George Cardona previously pointed out this fact, the Commission was quick to conclude that this "does not necessarily demonstrate that there is no problem or that such a problem might not reasonably be anticipated."[5] The Commission, however, has not and cannot demonstrate that there is or might be a problem with subpoenas being issued in these jurisdictions, and California, in particular. There simply is no empirical evidence of which we are aware that prosecutors, let alone federal prosecutors, in California use subpoenas to interfere with attorney-client relationships in a way that would warrant creating an ethical rule to regulate their doing so.[6] In

[2] See Brief of Amicus Curiae Am. Bar Ass'n at 3-9, Sup. Ct. of N.M., et al. v. United States, No. 16-1323 (Sup. Ct. filed June 5, 2017) (hereinafter "ABA Brief"); see also Am. Bar Ass'n, A Legislative History: The Development of the ABA Model Rules of Prof'l Conduct, 1982-2013 529-30 (Art Garwin, ed., 2013).

[3] Alphabetically, they are Alaska, Arizona, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Washington, West Virginia, and Wisconsin. See Am. Bar Ass'n Comm. on Prof'l Resp. Policy Implementation Comm., Variations of the ABA Model Rules of Prof'l Conduct: Rule 3.8(e) (May 6, 2015) (hereinafter "Model Rule 3.8(e) Variations"), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_e.authcheckdam.pdf. Although the ABA's chart indicates that West Virginia "[d]oes not have" a version of Model Rule 3.8(e), the most recent version of West Virginia Rule 3.8 does contain a version thereof. See W. VA. RULES OF PROF'L CONDUCT R. 3.8(e) (2014).

[4] They are, based on 2016 population rankings by the U.S. Census Bureau (in parentheses): California (1), Texas (2), Florida (3), New York (4), Pennsylvania (6), Michigan (10), Virginia (12), Maryland (19), Alabama (24), Oregon (27), Connecticut (29), Arkansas (33), Utah (31), Mississippi (32), Hawaii (40), Maine (42), the District of Columbia (49), and Wyoming (51). See Model Rule 3.8(e) Variations, supra n.3; U.S. Census Bureau, Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016 (NST-EST2016-01), available at https://www2.census.gov/programs-surveys/popest/tables/2010-2016/state/totals/nst-est2016-01.xlsx.

[5] See Comm'n Response to Dissent Submitted by George Cardona on the Recommended Adoption of Proposed Rule 3.8(e) at 2, available at http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000018653.pdf. Interestingly, after a study by the Bar Association of the City of New York in 1985 that ostensibly did provide such evidence, see ABA Brief at 5, New York nevertheless declined to adopt a version of Model Rule 3.8(e).

[6] Indeed, the ABA offers no support in its *amicus* brief in Sup. Ct. of N.M. for its "belie[f] . . . that the need to

addition, the Department of Justice has adopted a policy regarding issuance of subpoenas to attorneys for information relating to the representation of clients, and the policy generally requires that a Department attorney obtain high level supervisory approval prior to issuing the subpoena.[7] Accordingly, we do not think that such a Rule is necessary.

Not only is there an absence of empirical evidence that would justify an ethical rule regulating circumstances in which a prosecutor may issue a subpoena to another lawyer, as the U.S. Court of Appeals for the Tenth Circuit recently concluded, applying such a rule to federal prosecutors, at least in the grand jury context, violates the Supremacy Clause.[8] The Supreme Court of New Mexico has filed a petition for a writ of certiorari with the Supreme Court in Sup. Ct. of N.M., et al. v. United States.[9] The United States opposes the grant of the Supreme Court of New Mexico's petition, and has filed a conditional cross-petition seeking review of the Tenth Circuit's ruling with respect to trial subpoenas in the event that the Supreme Court grants the New Mexico Supreme Court's petition.[10] Although we recognize that the Tenth Circuit's decision only constitutes persuasive authority in California, we think that it would be prudent for the Commission to defer any action on the proposed rule until the Supreme Court has decided whether to review the Tenth Circuit's decision.

If the Commission decides to adopt an attorney subpoena rule despite the Supremacy Clause problem identified by the Tenth Circuit, we agree with the Chief Trial Counsel that the proposed rule should apply to all lawyers.[11] As the Supreme Court of California implicitly has recognized, the concerns underlying an attorney subpoena rule are not limited to criminal investigations and cases.[12] Nor are they limited to circumstances in which a criminal defense

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protect against prosecutorial ethical misconduct in the grand jury context . . . remains as critical today as when Congress passed Section 530B. . . ." See ABA Brief at 22.

[7] See U.S. Attorney's Manual § 9-13.410 (Guidelines for Issuing Subpoenas to Attorneys for Information Relating to the Representation of Clients).

[8] See United States v. Sup. Ct. of N.M., et al., 839 F.3d 888, 923, 928 (10th Cir. 2017) (holding that, in the grand jury context, "the [essentiality and no-other-feasible alternative] provisions of [New Mexico] Rule 16-308(E) conflict with federal law and are preempted"); United States v. Colo. Sup. Ct., 189 F.3d 1281, 1283-84, 1289 (10th Cir. 1999) (holding that the then-existing Colorado Rule of Professional Conduct regulating attorney subpoenas, as modified by the U.S. District Court for the District of Colorado to exclude grand jury proceedings, "is not inconsistent with federal law and can be adopted and enforced . . . against federal prosecutors").

[9] Petition for a Writ of Certiorari, Sup. Ct. of N.M., et al. v. United States, No. 16-1323 (Sup. Ct. filed May 1, 2017).

[10] Conditional Cross-Petition for a Writ of Certiorari at 2, United States v. Sup. Ct. of N.M., et al., No. 16-1450 (Sup. Ct. filed June 5, 2017).

[11] See Letter from Steven J. Moawad, Chief Trial Counsel, State Bar of Cal., to Justice Lee Edmon & Randall Difuntorum, Office of Prof'l Competence, Planning and Development, State Bar of Cal. (June 29, 2017), available at http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000018652.pdf (hereinafter "OCTC Letter").

[12] See Order Re Request for Approval of Amendments to Rule 5-110 and Rule 5-220 of the Rules of Professional Conduct of the State Bar of California, Admin. Order 2017-04-26, S239387 at 1 (Cal. May 1, 2017) (*en banc*), available at http://www.calbar.ca.gov/Portals/0/documents/ethics/2d_RRC/AdministrativeOrder2017-04-26.pdf.

attorney is subpoenaed. Any time that a lawyer is subpoenaed to provide evidence about a current or former client, there is a potential impact on the attorney-client relationship. In the criminal context, this impact must be balanced with "the public's interest in maintaining a grand jury with broad investigative power and the right to every man's evidence."[13] Although this strong public interest is at least equal to the interests of private litigants in civil cases, if the Commission concludes that the proposed rule only should apply to prosecutors, we think that Alternative 2, which generally is consistent with Model Rule 3.8(e), is the better choice. Because it is consistent with Model Rule 3.8(e), prosecutors can rely on the existing authority interpreting that Rule to guide their conduct.

Regardless of which alternative the Commission decides to adopt, we strongly agree with the Chief Trial Counsel that the proposed rule should permit a lawyer to subpoena another lawyer for non-privileged information relating to the representation of a current or former client where "the evidence sought is *reasonably necessary*" and "there is no other *reasonable* alternative to obtain the information."[14] As the Chief Trial Counsel reasoned, the phrase "reasonably necessary" and the term "reasonable" provide fair, definite, and clear guidance as to the standard by which a lawyer conduct will be judged.[15] Indeed, the Commission already has defined the terms "reasonable" and "reasonably" in proposed California Rule 1.0.1, ostensibly because they are used throughout the proposed California Rules of Professional Conduct.[16] We also think that the phrase "reasonably necessary" and the term "reasonable" strike the appropriate balance between protecting attorney-client relationships and the public interest in investigating and prosecuting criminal conduct. As the First Commission for the Revision of the Rules of Professional Conduct of the State Bar of California observed:

> It is a difficult, if not impossible, task to decide *ex ante* what evidence will be "essential" to a successful prosecution and therefore a permissible subject of a subpoena addressed to a lawyer. The standard of "evidence reasonably necessary to the successful prosecution" is more readily applicable and creates less risk for a prosecutor attempting to evaluate evidence at the start, or in the midst, of an investigation or prosecution.[17]

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[13] ABA Brief at 7 (quoting Am. Bar Ass'n Crim. Justice Sec. Report to the House of Del. & Recomm. 111D at 7 (Feb. 1986)).

[14] See OCTC Letter, supra n.11.

[15] See id.

[16] PROPOSED CAL. RULES OF PROF'L CONDUCT R. 1.0.1(h), available at http://www.calbar.ca.gov/Portals/0/documents/ethics/2D_RRC/2017_Proposed-Rules-Final-040417.pdf ("'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.").

[17] See Commission Member Dissent, Submitted by George Cardona, on the Recommended Adoption of Proposed Rule 3.8 at 2, available at http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000018653.pdf.

In addition, "[i]f 'feasible' means only that the alternative is theoretically possible even if not reasonable, the standard is too low. If 'feasible' means that the alternative is reasonable, the more familiar term 'reasonable' should be used."[18]

It is crucial that prosecutors be able to subpoena non-privileged evidence in criminal investigations and cases. In bankruptcy and investment fraud cases, for example, defendants may have retained lawyers to draft false bankruptcy filings or investment solicitations based on false information that the defendants themselves provide. In money laundering cases, defendants may have persuaded lawyers to deposit and withdraw funds in their trust accounts by making false representations regarding the source and purpose of the funds. In tax cases, defendants may have disclosed to a lawyer a wealth of historical documents relating to assets and expenses that reveal violations of the tax code. In each of these situations, although the information sought clearly is not privileged, it may be difficult to tell whether the information is "essential" to a prosecution or whether there are other "feasible" alternatives to obtain the information. Even assuming that there are other "feasible" ways to obtain this information, these alternatives may be unnecessarily intrusive to others who are innocent of any wrongdoing. Adopting an ethical rule that limits the circumstances in which prosecutors can compel an attorney to provide non-privileged evidence in criminal investigations and cases unnecessarily limits the ability of prosecutors and grand juries to investigate persons who have used and would use attorneys to conceal their crimes. Worse still, it limits the abilities of prosecutors and grand juries to investigate attorneys who discredit and undermine the public's trust in the legal professional by intentionally engaging in criminal acts with their clients. Although the proposed Rule purports only to regulate prosecutors, as the Supreme Court has recognized, a grand jury "depends largely on the prosecutor's office to secure the evidence or witnesses it requires."[19]

Conclusion

We are grateful for the opportunity to comment and want to thank the Commission for their important work on the revisions to the California Rules. In the absence of any empirical evidence that prosecutors or other lawyers in California are using subpoenas to interfere with attorney-client relationships improperly, however, we do not think that there is a need for an ethical rule to regulate the issuance of subpoenas to attorneys. If the Commission disagrees, we think that it would be prudent for the Commission to defer any action on the proposed rule until such time as the Supreme Court determines whether such a rule, as applied to federal prosecutors, would violate the Supremacy Clause. Moreover, because there is a potential impact on the attorney-client relationship any time a lawyer is subpoenaed to provide evidence about a current or former client, we agree with the Chief Trial Counsel and see no reason why such a rule should not apply to all lawyers. If the Commission concludes that the proposed rule only should apply to prosecutors, however, we think that Alternative 2 is the better choice. Regardless of which alternative the Commission decides to adopt, however, we strongly agree

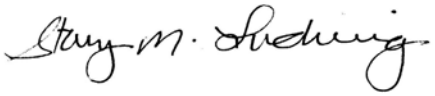
[18] Id.

[19] United States v. Sells Eng'g, Inc., 463 U.S. 418, 430 (1983). Indeed, it is unclear how a federal grand jury would issue a subpoena on its own insofar as Rule 17 of the Federal Rules of Criminal Procedure states that the clerk of court must issue a subpoena "to the party requesting it" and that the "party must fill in the blanks before the subpoena is served." Fed. R. Crim. P. 17(a); see also 1 Sara Sun Beale, et al., Grand Jury Law & Practice § 6:2, at 6-13 (2d ed. 2016) (observing that grand jury subpoenas are "issued and served by representatives of the federal prosecutor's office").

with the Chief Trial Counsel that the proposed rule should permit a lawyer to subpoena another lawyer for non-privileged information relating to the representation of a current or former client where "the evidence sought is *reasonably necessary*" and "there is no other *reasonable* alternative to obtain the information."

Sincerely,

Andrew D. Goldsmith
Associate Deputy Attorney General
National Criminal Discovery Coordinator
Office of the Deputy Attorney General



Stacy M. Ludwig
Director
Professional Responsibility Advisory Office

RRC3 – Rule 5-110(E)
Post-Agenda E-mails, etc. – Revised (October 11, 2017)

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RRC3 – Rule 5-110(E)
Post-Agenda E-mails, etc. – Revised (October 11, 2017)

October 5, 2017 Cardona Email to Difuntorum & McCurdy:

I remain of the view that no rule governing the issuance of subpoenas to attorneys is necessary. In this regard, I note as follows.

(1) The Commission's charter instructed us to begin with the California rules, making changes only as necessary. California has had no rule governing subpoenas to attorneys, and, as discussed below, there does not seem to be any compelling reason to adopt a new rule governing such subpoenas, whether in civil or criminal cases.

(2) None of the public comments that has been received makes out any compelling reason for adoption of a rule. If this were a serious problem, one would expect comments from the bar vigorously advocating a need for the rule. We have received no such comments. To the contrary, on the civil side, the few comments we have received unanimously favor not adopting such a rule, making the case that any issues are already addressed by existing rules and case law. On the criminal side, no comment provides any empirical evidence supporting the need for a rule. Were attorney subpoenas issued by prosecutors a serious concern to the defense bar, we would have expected extensive comments making this clear (as we received in connection with proposed Rule 5-110(D) addressing prosecutors' disclosures of exculpatory information).

That we received no such comments suggests that this is not an issue of serious concern that warrants adoption of a new rule. Moreover, OCTC, the agency tasked with enforcement of the rules, and which would be expected to have seen instances of abuse if they existed, has stated that it "is not aware of a great need for a rule of professional conduct addressing when an attorney can or cannot subpoena a lawyer in a civil or criminal proceeding to present evidence about a current or former client."

(3) The goal of national uniformity will not meaningfully be furthered by adoption of the rule. Many of the largest jurisdictions (in terms of numbers of lawyers, and more particularly, numbers of lawyers with multi-jurisdictional practices that may bring them within the scope of the California rules) have not adopted a rule governing prosecutor subpoenas to attorneys. This includes New York, DC, Florida, and Texas – all jurisdictions with federal prosecution offices of similar size and caseload to those in California. That these jurisdictions have not seen a need to adopt such a rule suggests that there is no significant level of abuse that would compel adoption of the rule.

October 6, 2017 Tuft Email to Difuntorum, A. Tuft, Mohr & McCurdy:

I offer the following observations and recommendations for the Commission's consideration.

1. It is significant that we have not received any comments from the criminal defense bar regarding the two alternative versions of proposed Rule 5-110(E). This supports the view that "other law" is sufficient to address the threat of prosecutorial

intrusion into an accused's attorney-client relationship and that there is a insufficient empirical evidence to justify the need for a disciplinary rule in California.

2. The long standing dispute over issuing subpoenas to current and former lawyers of a suspect to testify before grand juries has had little recurrence in California; perhaps because state prosecutors rarely seek indictments from grand juries and DOJ's guidelines have generally been followed in federal proceedings.

3. The only legitimate objective for an ethics rule is to prevent unjustified intrusions into an accused's constitutional right to counsel and to due process of law. A corollary policy would be to insure that counsel are not subject to unnecessary conflicts that require counsel's withdraw, especially when there is a growing need for competent counsel for persons facing criminal charges. While criminal defense counsel are not fungible and many lawyers lack the resources to fight subpoenas to give testimony against their clients, positive law affords remedies against prosecutors obtaining privileged information from counsel and for abusive attempts to interfere with an accused's attorney-client relationship.

4. DOJ and George Cardona cite compelling reasons for issuing subpoenas for non-privileged evidence from lawyers in criminal investigations and cases. I would add to the list of examples cited on page 5 of DOJ's August 28, 2017 letter the flood of fee forfeiture cases in which the Supreme Court has generally disposed of constitutional challenges to even "retroactive" forfeiture of fees that are proceeds of a crime. The Court has confirmed in these cases that the Sixth Amendment does not provide an absolute right to counsel of choice. *United States v. Monsanto*, 491 U.S. 600 (1989), *Caplin & Drysdale v. United States,* 491 U.S. 617 (1989) and recently *Luis v. United States,* 136 S. Ct. 1083 (2016).

5. Abusive prosecutorial conduct designed to interfere with an accused's attorney-client relationship would likely violate Rule 3.8(b) (prosecutor must give defendants reasonable access to counsel) and Rule 8.4(d) (conduct prejudicial to the administration of justice). The Court in *Monsanto* also intimated that abusive attempts designed to oust counsel would violate the Sixth Amendment and Fifth and Fourteenth Amendments.

6. Lawyers in California have a duty to assert the attorney-client privilege and take reasonable steps to preserve client secrets, including bringing motions to quash grand jury and other subpoenas in criminal proceedings. Evidence Code §955, Bus & Prof. Code §6068(e)). Defense counsel are not immune from having to produce physical evidence of a crime (Rule 5-220) or even from search warrants (Probate Code §1524(c)). As one commentator stated, a more appropriate remedy to a disciplinary rule restricting prosecutors from issuing grand jury subpoenas is for lawyers to properly advise their clients at the outset about the limits of the duty of confidentiality. Fred Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 Minn. L. Rev 917 (1992).

7. For these reasons, I recommend we do not adopt Alt 2 or 3. There is no legitimate basis for adopting Alt 1. The reasons advanced by Jim Ham and COPRAC

are compelling. The fallback positions by OCTC and DOJ in favor of Alt 1 lack legal and empirical support. Alt 1 is an example of the organized bar attempting to replace existing procedural and substantive law with its own view of proper lawyering.

8. The Supremacy Clause issue is not trivial. If we are to consider Alt 2 or 3, I recommend deferring adoption of either option until the Supreme Court has decided whether to review the Tenth Circuit's decision in *United States v. Sup. Ct of New Mexico.*

9. Finally, if we are to have a rule, I recommend we consider a narrower rule that focuses on the risk of harm to the defendant's right to counsel, such as the following:

> "A prosecutor in a criminal case shall:
>
> . . .
>
> (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a current or former client represented by the lawyer in a criminal matter if the prosecutor knows or reasonably should know that the evidence is subject to the attorney-client privilege.

Attached:
1196086_1.docx

October 6, 2017 Mohr Email to Difuntorum, McCurdy, A. Tuft & Lee:

I've attached a Synopsis Table with some suggested responses. In some instances I've suggested alternative responses given that we don't know what the final votes will be.

My own position, after further consideration of the proposed rules, the background on the ABA's adoption of MR 3.8(e), and the public comments that were submitted, is that a subpoena rule analogous to MR 3.8(e) is not warranted in either the civil or criminal context.

However, if the Commission were to favor a rule for prosecutors only, then I would support a rule that is identical to MR 3.8(e), i.e., that retains the "essential" and "feasible" standards in subparagraphs (2) and (3), respectively.

Please let me know if you have any questions. Thanks,

Attached:
RRC2 - [3.8][5-110(E)] - 45-day Public Comment Synopsis Table - REV (10-06-17)-KEM.doc

October 10, 2017 Rothschild Email to Difuntorum & McCurdy:

For what it's worth, the Supreme Court denied cert. in Supreme Court of New Mexico v. United States last week.

Rule 3.8 Special Responsibilities of a Prosecutor
(Commission's Proposed Rule Adopted on October 24, 2017)

The prosecutor in a criminal case shall:

(a) not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;

(b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.

(f) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(g) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Discussion

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.* This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4.

[2] Paragraph (c) does not forbid the lawful questioning of an uncharged suspect who has knowingly* waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable* waiver of time for initial appearance or preliminary hearing as a means of facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (d) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S. Ct. 1194] and its progeny. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows* or reasonably should know* casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely. Paragraph (d) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and paragraph (d) is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[4] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal* if disclosure of information to the defense could result in substantial* harm to an individual or to the public interest.

[5] Paragraph (e) supplements rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (e) is not intended to restrict the statements which a prosecutor may make which comply with rule 3.6(b) or 3.6(c).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (e) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (f) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (f) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 4.2.)

[8] Under paragraph (g), once the prosecutor knows* of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (gf) and (g), though subsequently determined to have been erroneous, does not constitute a violation of this rule.